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No. 89-1098

In the Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES,
PETITIONER

v.

CONSTANCE BERRY NEWMAN, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the invasion of personal privacy that would result from public dissemination of a list of the names and addresses of recent federal retirees outweighs any public interest in dissemination, so that release of the list is barred by Exemption 6 of the Freedom of Information Act, 5 U.S.C. 552(b)(6).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-14a) is reported at 879 F.2d 873. The opinion and order of the district court (Pet. App. 18a-26a) are reported at 633 F. Supp. 1241.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1989. A petition for rehearing was denied on September 13, 1989 (Pet. App. 16a-17a). On December 6, 1989, the Chief Justice extended the time for filing a petition for a writ of certiorari to January 11, 1990, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises under Exemption 6 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(6), which exempts information from disclosure if its release "would constitute a clearly unwarranted invasion of personal privacy." This language requires "the balancing of private against public interests" to determine whether the release of personal information may nevertheless be "warranted." *United States Dep't of State* v. *Washington Post Co.*, 456 U.S. 595, 599 (1982); *Department of the Air Force* v. *Rose*, 425 U.S. 352, 373 (1976).

Petitioner, the National Association of Retired Federal Employees (NARFE), sought a list of the names and home addresses of persons who had recently become federal annuitants – *i.e.*, recent federal retirees and others who had been added to the federal annuity rolls due to disability or survivorship. The Office of Personnel Management (OPM) denied the request. OPM concluded that public release of the information would constitute a "clearly unwarranted invasion of personal privacy," and it was thus exempt from disclosure pursuant to FOIA Exemption 6.[1]

NARFE brought the present action to compel disclosure of the names and addresses, and the district court granted its motion for summary judgment. Pet. App. 18a-26a. The district court ruled that the privacy interest federal retirees have in public release of their names and home addresses is "slight" because such information does not convey " 'intimate details' of a 'highly personal' nature." Pet. App.

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[1] From 1979 and 1981, OPM had facilitated NARFE's communications with new annuitants – without releasing the names and home addresses of such persons – by cooperating in "blind mailings" in which NARFE would prepare informational materials and OPM would arrange for mailing at NARFE's expense. OPM discontinued this practice in 1981.

21a (quoting *Getman* v. *NLRB*, 450 F.2d 670, 675 (D.C. Cir. 1971)). In assessing the weight of the public interest supporting disclosure, the district court focused on NARFE's claim that it would use the information "to inform annuitants of the association's goals and services, and to solicit new members." Pet. App. 23a. The court concluded that the public interest outweighed the privacy interest. *Id.* at 25a.

Following initial briefing and argument, the court of appeals held the case in abeyance pending this Court's decision in *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468 (1989). After further briefing in light of *Reporters Committee*, the court of appeals reversed the order of the district court. In analyzing the privacy interest at stake, the court of appeals began by recognizing that Exemption 6 applies to all personal information, and not merely to "intimate" matters. Pet. App. 4a (citing *United States Dep't of State* v. *Washington Post Co.*, 456 U.S. at 600). The court also noted that, under *Reporters Committee*, the invasion of privacy must be assessed not by reference to the use the particular requester proposes to make of the information, but by reference to the "unlimited disclosure" of the subjects' names and home addresses that would be required if the information were released to *any* requester. Pet. App. 4a-5a. After considering both the inherent interest individuals have in "control over the disclosure of their own identities and whereabouts" and the inevitable practical consequences of the release of such a commercially useful mailing list (*id.* at 6a-7a), the court of appeals concluded that public dissemination of the information in question "would interfere with the subjects' reasonable expectations of undisturbed enjoyment in the solitude and seclusion of their own homes" (*id.* at 7a).

Turning to the public interest side of the Exemption 6 balance, the court of appeals recognized that, under the test articulated by this Court in *Reporters Committee*, the purported beneficial effects of NARFE's activities on behalf of federal retirees are irrelevant to the inquiry. Pet. App. 12a. Rather, the court explained, the question is whether disclosure would further *FOIA*'s core purpose, informing the public about "what their Government is up to." *Id.* at 13a. (quoting *Reporters Committee*, 109 S. Ct. at 1481). The court determined that disclosure of the names and home addresses of federal annuitants would not further that purpose. Pet. App. 12a-13a.

Having found a substantial privacy interest at stake and no public interest in disclosure, the court of appeals had no difficulty in striking an appropriate balance, since "something, even a modest privacy interest, outweighs nothing every time." Pet. App. 14a. Accordingly, the court held that "disclosure of the requested records 'would result in a clearly unwarranted invasion of personal privacy.' " *Ibid.* (quoting 5 U.S.C. 552(b)(6)).

ARGUMENT

Contrary to petitioner's contentions, the decision of the court of appeals is a correct and straightforward application of the principles recently enunciated by this Court in *Reporters Committee*. In the absence of any conflict in the courts of appeals (and petitioner does not allege a conflict), there is no warrant for further review.

1. In weighing the competing public and private interests, the court of appeals properly looked to this Court's recent decision in *Reporters Committee*, which addressed the nature of these interests under the similar balancing test of FOIA Exemption 7(C), 5 U.S.C. 552(b)(7)(C). Although Exemption 7(C) (which applies only to "law enforcement

records") affords "somewhat broader" protections than Exemption 6 (*Reporters Committee*, 109 S. Ct. at 1473), the underlying considerations involved under both exemptions are sufficiently analogous to make it appropriate to take account of precedents under one exemption when construing the other (*id.* at 1479).

NARFE focuses on the differences between Exemptions 6 and 7(C), and argues that the court of appeals erred due to its failure to heed "dispositive distinctions" between the two exemptions. Pet. 5-6. NARFE greatly overstates those differences. On the invasion of privacy side of the balance, NARFE notes that Exemption 7(C) prohibits the release of information that "could reasonably be expected" to constitute an invasion of privacy, while Exemption 6 speaks of information that "would constitute" such an invasion. Pet. 6-7. From this premise, NARFE faults the court of appeals for "speculation" in its assessment of the invasion of privacy inherent in the release of the information NARFE seeks here. Pet. 7-8. "Speculation" is allowed, in its view, under Exemption 7(C) but not under Exemption 6.

This argument is mistaken both in its characterization of the court of appeals' analysis and in its suppositions about the proper approach to evaluating the nature of the privacy interest under Exemption 6. As an initial matter, there was no speculation concerning the fact of invasion of privacy in this case. The information NARFE seeks would, on its face, reveal the names and addresses of many thousands of individuals, along with the fact that each one of these persons has recently become a federal annuitant. This is not simply a "threat[ ] to privacy interests" or a "mere possibilit[y]" of disclosure. Pet. 8 (quoting *Department of the Air Force* v. *Rose*, 425 U.S. at 380 n.19).[2] This

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[2] *Rose* concerned the requested release of redacted records that would not on their face have revealed anything about identified individuals,

case involves a direct disclosure of personal information. As the court of appeals noted, the very release of such information implicates significant privacy interests (Pet. App. 5a-6a)—a conclusion fully consistent with this Court's recognition that the term "privacy encompass[es] the individual's control of information concerning his or her person." *Reporters Committee*, 109 S. Ct. at 1476.

In addition to drawing this basic conclusion that the release of federal retirees' names and addresses infringes privacy interests, the court of appeals went on to consider the *extent* of such interests. While this portion of the court of appeals' analysis focused on the "substantial probability" that such infringement will be significant because "business people will not overlook an opportunity to get cheaply from the Government what otherwise comes dearly" (Pet. App. 11a-12a), NARFE errs in supposing that this sort of analysis is improper. As the court of appeals noted, this Court recognized in *Reporters Committee* that a full consideration of the privacy interests implicated by the release of personal information includes a practical assessment of the potential effects of disclosure. *Id.* at 11a (quoting *Reporters Committee*, 109 S. Ct. at 1478). Where analysis of such effects is necessary,[3] moreover, it will

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but which might have indirectly revealed such information to those able to couple the facts revealed with prior knowledge. 425 U.S. at 380-381. A similar situation was presented in *Arieff* v. *Department of the Navy*, 712 F.2d 1462 (D.C. Cir. 1983). As the court of appeals recognized, the key distinguishing feature of those cases—not shared by the present case—was the presence of "substantial doubt that any invasion of privacy would occur." Pet. App. 10a.

[3] This portion of the court of appeals' analysis was arguably unnecessary in the present case, in light of the court's conclusions that some significant privacy interests are implicated by the very fact of disclosure of name and address information (Pet. App. 5a-6a) and that there is *no* public interest under FOIA in the release of such information

inevitably entail assessments of likelihoods rather than certainties, because it must be conducted at a time when the dissemination of the information at issue is a hypothetical, future event. Regardless of whether a case involves Exemption 6 or Exemption 7(C), a court will improperly ignore an important element of analysis unless it makes an effort to assess the extent of the likely intrusion on personal privacy interests. Indeed, this Court's discussion of this point in *Reporters Committee* indicates that the same sort of analysis of "potential invasion of privacy" is required in Exemption 6 cases, such as *Rose*. 109 S. Ct. at 1479.

Thus, neither precedent nor logic supports NARFE's contention that courts applying Exemption 6 must ignore the likely consequences of dissemination unless the record shows that such consequences are a certainty. While the textual difference between the two exemptions doubtless means that there is greater flexibility in the sort of showing that is necessary in an Exemption 7(C) case (see 109 S. Ct. at 1473 n.9), the difference is more sensibly seen as one of degree. This difference may be dispositive in a case where a claimed adverse effect of disclosure is truly a matter of speculation. Here, however, the intrusive effects on which the court of appeals focused are ones which would follow predictably from the release of the information NARFE seeks—a list of names and addresses of individuals who have a guaranteed, regular annuity income, and are either retirees or disabled. The court of appeals was right to apply a common-sense approach to the assessment of the annuitants' privacy interests, which led to the conclusion that they would

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(*id.* at 13a). Because "something • • • outweighs nothing every time" (*id.* at 14a), these conclusions by themselves are sufficient to support the court's disposition of the case. Accordingly, the result in this case would be the same even if NARFE were correct in its criticisms of the court of appeals' analysis of the likely effects of disclosure.

be subjected to a "barrage of solicitations" if such lists were made available. Pet. App. 10a.

2. Exemptions 6 and 7(C) also differ in that Exemption 6 requires the withholding of information where the invasion of privacy occasioned by release is "clearly unwarranted," while Exemption 7(C) prohibits release where it is "unwarranted." Citing that difference, NARFE contends (Pet. 9) that it is not enough, in an Exemption 6 case, to know that there is no public interest warranting disclosure. Contrary to its contention, the language of the statute does not support that conclusion.

In *Reporters Committee*, this Court provided important clarification regarding the types of public interest that may warrant the release of information despite the existence of privacy concerns. The Court ruled that "whether disclosure * * * is warranted must turn on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act "to open agency action to the light of public scrutiny." ' " 109 S. Ct. at 1481 (quoting *Rose*, 425 U.S. at 372). Where the release of particular information does not serve the purpose of furthering "the citizens' right to be informed about 'what their government is up to' " (109 S. Ct. at 1481), there is no "public interest" to warrant disclosure.

The court of appeals followed these principles in a straightforward manner, concluding that there is *no* relevant public interest in the release of the information NARFE seeks, and therefore that even a modest invasion of privacy would not be warranted. Pet. App. 12a-13a. NARFE argues, however, that *Reporters Committee* is not applicable in an Exemption 6 case because, in its view, one can conclude that a disclosure is "clearly unwarranted" only by concluding that it would not only fail to serve FOIA's core purposes as defined by *Reporters Committee*, but that it would

also fail to serve an ill-defined set of other purposes set forth by NARFE. Pet. 10.

There is no reason to suppose that the word "clearly" requires analysis of purposes other than the purpose of FOIA; rather, the word denotes that, under Exemption 6, it must be *clear* that disclosure is not warranted. In those cases where there is something on each side of the balance, this may be an important difference, for it can properly be used to "tilt the balance" in favor of disclosure. See *Washington Post Co.* v. *HHS*, 690 F.2d 252, 261 (D.C. Cir. 1982) (quoting *Ditlow* v. *Shultz*, 517 F.2d 166, 169 (D.C. Cir. 1975)). Where, however—as in the present case—a court determines that there is *no* public interest in disclosure, no amount of "tilting" can warrant disclosure, and a court may readily conclude that an invasion of privacy is "clearly unwarranted."

Furthermore, the additional "public interests" that NARFE seeks to incorporate into the Exemption 6 analysis are of precisely the sort rejected in *Reporters Committee*. Significantly, all of the purported "public" interests that NARFE advances (Pet. 10-12) relate to the supposedly beneficial uses to which *it* would put the information it seeks, such as by "represent[ing] the rights and interests of retired federal employees." As this Court recognized in *Reporters Committee*, however, reliance on such considerations would be contrary to the fundamental FOIA principle that "Congress 'clearly intended' the FOIA 'to give any member of the public as much right to disclosure as one with a special interest' " in a particular document. 109 S. Ct. at 1480-1481 (quoting *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)). NARFE presents no reason why this principle, recognized as critical to the analysis under Exemption 7(C), should be ignored under Exemption 6.

Although NARFE attempts to relate its own interests to "facilitat[ing] the democratic process" (Pet. 11), its arguments are similar to the attenuated "public interest" arguments that this Court rejected in *Reporters Committee*. While the respondents in that case asserted that there was a broad public interest in information relating to persons who have dealings with the government (*e.g.*, defense contractors), the Court recognized that a principled analysis of the "public interest" must have a more precise focus, inquiring whether disclosure would "shed any light on the conduct of any Government agency or official." 109 S. Ct. at 1481.[4] NARFE does not even purport to argue that the information it seeks would serve any such purpose.[5] As the court of appeals concluded, "[t]he simple fact is that those records say nothing of significance about 'what the[ ] Government is up to.' " Pet. App. 13a.

3. Finally, NARFE complains (Pet. 13) of the supposedly sweeping nature of the court of appeals' ruling, which it asserts will make it impossible for any organization to use FOIA as a means of obtaining mailing lists from the federal government. This complaint is ironic in light of the care with which the court of appeals limited its ruling. Since, in our view, there is an extraordinarily small likelihood that

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[4] One reason why such a properly delimited "public interest" test is necessary is to avoid the "idiosyncratic" judgments that would be called for under a more broad-ranging test. See *Reporters Committee*, 109 S. Ct. at 1474 (quoting the court of appeals' decision, *Reporters Comm. For Freedom of the Press v. United States Dep't of Justice*, 816 F.2d 730, 741 (D.C. Cir. 1987)). NARFE's expansion of the "core purposes" analysis would engender the same sort of standardless inquiries that this Court sought to avoid in *Reporters Committee*.

[5] NARFE's argument that its litigation on behalf of federal retirees furthers the "public interest"—it specifically contends that if it prevails the retirees will receive additional money and therefore owe additional federal taxes (Pet. 11-12)—is frivolous. Under such logic, *any* purely private financial interest would be transformed into a "public" interest.

the names and addresses of individuals in government files could *ever* serve a public interest as defined in *Reporters Committee*, the court of appeals might well have been justified in making a more categorical holding that Exemption 6 bars the use of FOIA to obtain such mailing lists. Cf. 109 S. Ct. at 1483-1485. The court of appeals, however, carefully avoided passing on this broad issue (Pet. App. 14a), and preserved the possibility of a contrary result where the privacy interests at stake are "*de minimis*" (*id.* at 3a, 8a-9a).[6]

The care with which the court of appeals limited its ruling militates against the grant of certiorari in the present case. Because the court of appeals did not purport to set down a blanket rule affecting all requests for name and address lists, it is too early to assess the impact of its approach. Other cases, presenting differing factual situations, may or may not confirm our position that the release of such lists will seldom, if ever, be warranted by any legitimate public interest. Certainly this single decision does not present any issue requiring review by this Court.

Furthermore, this Court's ruling in *Reporters Committee*, which greatly clarified the proper approach to the balancing of private and public interests under FOIA, was

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[6] NARFE argues that Congress's consideration in 1983 of proposed legislation that would have made specific mention of name and address lists undermines the decision below. In so arguing, NARFE ignores "the oft-repeated warning that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (quoting *United States* v. *Price*, 361 U.S. 304, 313 (1960)). This hazard is particularly acute here, moreover, since the "legislative history" on which NARFE relies relates to legislation that was never adopted. See *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 609-610 & n.11 (1966). Such inconclusive legislative activity in 1983 sheds no light on the meaning of Exemption 6, adopted as part of the original FOIA in 1966.

handed down less than one year ago. Only a handful of courts have had occasion to apply its teachings to either of the FOIA privacy exemptions, and, apart from the present case, only one other decision has discussed in any detail its application to Exemption 6. See *FLRA* v. *United States Dep't of the Treasury*, 884 F.2d 1446 (D.C. Cir. 1989). This Court recently denied petitions for a writ of certiorari seeking review of that decision (*AFGE* v. *Department of HHS; National Treasury Employees Union* v. *United States Dep't of Treasury*, 110 S. Ct. 863 (No. 89-444; No. 89-566) and 110 S. Ct. 864 (No. 89-853) (1990)), and no different result is warranted here. NARFE does not contend that there is any division of authority regarding the proper application of the principles of *Reporters Committee* to cases under Exemption 6, and has presented no special reasons why the Court should address this issue now. On the contrary, NARFE stresses that issues similar to those presented in this case are likely to "arise in virtually every federal agency and court throughout the country." Pet. 5. Accordingly, there will be ample time for this Court to revisit the issues addressed so recently in *Reporters Committee* if and when future decisions by the lower courts indicate a need for it to do so.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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*The Solicitor General is disqualified in this case.

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